Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ORRIE TUCKER AND CATHERINE TUCKER,
PETITIONERS

v.

METROWEST MEDICAL CENTER, F/K/A
FRAMINGHAM UNION HOSPITAL, AND
WILLIAM S. GEORGE, M.D.,

PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it consistent with due process for the State court to punish the plaintiffs with the most severe sanction of dismissal of their claims with prejudice and without a trial for their attorney's gross neglect, egregious behavior which the plaintiffs never knew about, condoned or approved?

2. Does it square with fundamental fairness to deny plaintiffs the right to a trial on the merits of their malpractice claims by refusing to characterize their attorney's inexcusable and gross neglect in prosecuting their claims as the kind of "extraordinary circumstance" which justifies relief from a judgment of dismissal under Rule 60(b), especially where the plaintiffs never knew about, condoned or approved of their former attorney's egregious behavior?

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OPINIONS BELOW

The unpublished memorandum and order of the Massachusetts Appeals Court pursuant to its Rule 1:28 in *Orrie Tucker & another v. Metrowest Medical Center et al.*, 60 Mass. App. Ct. 1108(12/18/03), summarily affirming the motion judge of the Superior Court Department, is set forth in the Appendix hereto(App. 1-6).

The unpublished entry of judgment after rescript by the Middlesex Division of the Superior Court Department of Massachusetts in *Orrie Tucker et al. v. Metrowest Medical Center, f/k/a Framingham Union Hospital et al.*, Middlesex Docket No. MICV2000-05888-A(1/21/04), is set forth in the Appendix hereto(App. 7-8).

The order of the Supreme Judicial Court of Massachusetts in *Orrie Tucker & another v. Metrowest Medical Center et al.*, 441 Mass. 1108(5/3/04), denying the plaintiffs-appellants' Application For Further Appellate Review and allowing its late filing, is set for the in the Appendix hereto(App. 9-10).

The unpublished memorandum and order of the Middlesex Division of the Superior Court Department of Massachusetts (Zobel, J.) in *Orrie Tucker & another v. Metrowest Medical Center et al.*, Middlesex Docket No. MICV2000-05888-A(1/10/02), is set forth in the Appendix hereto(App. 11-12).

The excerpts of the Plaintiffs-Appellants' Brief filed in the Appeals Court of Massachusetts in the case of *Orrie and Catherine Tucker v. Metrowest Medical*

Center, f/k/a Framingham Union Hospital and William S. George, M.D., A.C. No. 2002-P-0461, pp. 29-43, is set forth in the Appendix hereto(App. 13-15).

JURISDICTION

The order of the Supreme Judicial Court of Massachusetts, the state court of last resort having jurisdiction to review the decisions of all inferior state courts, refusing to allow further appellate review of the Appeals Court's summary affirmance of the Superior Court's ruling, was entered on May 3, 2004(App. 9-10).

This petition for certiorari by Tucker is filed within ninety (90) days from the date of the order of the Supreme Judicial Court denying Tucker further appellate review of the Appeals Court's decision. 28 U.S.C. Section 2101(c). *American Railway Express Co. v. Levee*, 263 U.S. 19, 20-21(1923).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1257(a).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any

person of life, liberty, or property,without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Mass. R. Civ. P. 60(b):

(b) Mistake; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3), not more than one year after the judgment, order or proceeding was entered or taken. A motion under this

> subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud on the court....

STATEMENT

On December 20, 2000, the Petitioners Orrie Tucker and Catherine Tucker ("Tucker") filed a complaint against the Respondents Metrowest Medical Center f/k/a Framingham Union Hospital ("Metrowest") and William S. George, M.D. ("Dr. George"), Orrie Tucker's Primary Care Physician, claiming that both were negligent from on or about December 27, 1996, until November 22, 1997, in failing to diagnose Orrie Tucker's colon cancer thereby causing him personal injuries and resulting in a loss of consortium and emotional distress for his wife, Catherine Tucker.

Specifically, Tucker claimed that Metrowest and its employee, Dr. George, failed to treat and diagnose properly Orrie Tucker's presenting symptoms of bloody rectal discharge precipitated by an episode of diarrhea and vomiting in Metrowest's Emergency Room in December of 1996. Metrowest's Dr. Brown saw and examined Tucker at this time and felt a large rectal polyp. A gastrointestinal consultation by another doctor at Metrowest (Dr. Bruce Marcel) recommended a stool culture as well as a sigmoidoscopy after Tucker was discharged from Metrowest. However, Dr. George,

Orrie Tucker's Primary Care Physician and Metrowest's employee, did not follow up with the sigmoidoscopy or a stool culture and they were never performed.

Orrie Tucker was eventually readmitted to Metrowest in November of 1997 with a staphylococcal endocarditis which resulted in his immediate transfer to Brigham and Women's Hospital for emergency abdominal surgery for adenocarcinoma of the colon by intussusception of the colon and the removal of an eight (8) inch section of the colon requiring a colostomy. The post-operative diagnosis was that the intussusception was induced by a large polyp as the leading point with a carcinoma-in-situ in it. Orrie Tucker did well post-operatively and the colostomy was closed in a few months.

According to Tucker, routine and accepted medical practice dictated that Orrie Tucker's presenting symptoms in Metrowest's Emergency Room in December of 1996 of *bloody* rectal discharge precipitated by an episode of diarrhea and vomiting together with Dr. Marcel's consulting recommendation that a stool culture as well as a sigmoidoscopy be performed after Tucker was discharged, required that Metrowest's Dr. George, as Tucker's Primary Care Physician and Metrowest's employee, perform a sigmoidoscopy and/or a colonoscopy. That he did not do so was the foundation of Tucker's claim that Metrowest and its employee, Dr. George, had deviated from the standard of care in the circumstances.

As Tucker eventually showed through their expert proof, "[t]he intussusception would not have

occurred had the proper follow up of the GI bleed been done because the polyp would not have been there to be a leading point. The colon resection and colostomy would not have been done and the associated discomfort and suffering would not have occurred."

Both Metrowest and Dr. George answered by denying all of Tucker's allegations, asserting various affirmative defenses and requesting a Medical Malpractice Tribunal pursuant to G.L.c. 231, Section 60B. The Tribunal was convened on April 25, 2001, and Tucker's counsel, Ms. Roberta Golden, informed counsel for Metrowest and Dr. George that she would not submit an offer of proof to the Tribunal but instead would post a $6,000 bond in order to continue the action regardless of the Tribunal's decision. She did so that day and the Tribunal found that there was insufficient evidence to raise a legitimate question of liability appropriate for judicial inquiry. Two days later, on April 27, 2001, Metrowest and Dr. George jointly moved to increase the amount of the bond consistent with the procedure outlined in *Denton v. Beth Israel Hosp.*, 392 Mass. 277(1984).

On June 28, 2001, the Superior Court Department, Zobel, J., heard the defendants' joint motion to increase the bond. He allowed the motion and set the bond at $12,000 but stayed its implementation until August 10, 2001, with a further hearing to be held at that time. This ruling was bottomed on Attorney Golden's representation to the Court that she had an expert letter regarding the defendants' liability in this matter but that it was not presently with her in court. Judge Zobel ordered Attorney Golden to fax the letter to the defendants' counsel by the close of that day(June

28, 2001).

Attorney Golden failed to fax the undated expert's letter to the defendants' counsel until July 10, 2001. In addition, defense counsel subsequently learned from the expert (Dr. Charles Lipson) that he had not written his report concerning the defendants' liability until July 5, 2001.

The hearing scheduled for August 10, 2001, was rescheduled for October 30, 2001. Judge Zobel was then informed by defense counsel of Attorney Golden's misrepresentation about the existence of the expert's letter on June 28, 2001, and her subsequent failure to fax the letter to defense counsel until July 10, 2001. The lower court thereupon removed the stay of his previous order, increased the bond to $12,000 and further ordered that Attorney Golden personally pay the additional $6,000 for the increased bond "within ten business days" and that it "[n]ot be passed to the client."

With the additional bond of $6,000 not forthcoming from Attorney Golden by November 13, 2001, Metrowest and Dr. George jointly moved to dismiss Tucker's civil action based upon Attorney Golden's failure to comply with the Court's order. On November 21, 2001, Judge Zobel allowed the defendants' motion and entered an order dismissing Tucker's complaint against both Metrowest and Dr. George with prejudice.

Attorney Golden then filed the required additional bond on December 13, 2001, and moved for a reconsideration under Mass. R. Civ. P. 60(b) of the

dismissal of Tucker's claims. On January 11, 2002, Judge Zobel denied the motion. In a memorandum, the lower court wrote that

> the difficulties and delays this case has produced *are due entirely to the unexcused—-indeed, inexcusable—conduct of Plaintiff's [sic] counsel*....A party is ordinarily entitled to a day in court, however obnoxious the lawyer's conduct. This right is nonetheless not unlimited. As between a plaintiff whose lawyer's conduct has provoked condign punishment and the innocent defendant—-put to unfair delay, expense, and uncertainty by plaintiff's counsel's shenanigans—the former should bear the consequences.

(App.11-12)(emphasis supplied in italics and emphasis in original is underlined).

Judgment accordingly entered on January 11, 2002. After noticing an appeal from the judgment, Tucker, now represented by a new attorney, filed a second motion for reconsideration under Rule 60(b). It sought the indulgence of the motion judge to give Tucker their day in court in order to prove their meritorious claims against Metrowest and Dr. George. The motion was based upon Attorney Golden's withdrawal together with the appearance of new counsel, the resubmission of the cash surety bond of

$6,000 and the notion that Tucker should not be unfairly penalized by denying them their day in court for the conduct of their prior counsel. On April 23, 2002, the Superior Court Department, Locke, J., denied Tucker's second motion for reconsideration.

Tucker appealed this judgment to the Appeals Court. In their Brief as the Plaintiffs-Appellants, Tucker argued *inter alia* that this procedural scenario which resulted in the dismissal of their complaint for the egregious misconduct of their counsel in failing to pay timely the bond as ordered deprived them of due process and the equal protection of the laws as guaranteed them by the federal constitution(App.13-15).

On December 18, 2003, the Appeals Court of Massachusetts in an opinion issued under its Rule 1:28, summarily affirmed the decision of the Superior Court Department dismissing Tucker's civil action. *Orrie Tucker & another v. Metrowest Medical Center & another*, 60 Mass. App. Ct. 1108 (2003)(App. 1-6). In its unpublished memorandum, the Appeals Court ruled that Judge Zobel did not abuse his discretion in increasing the amount of the bond(App.4-5). Moreover, when Attorney Golden then failed to pay the additional bond on time, it ruled that the lower court did not err "in allowing the defendants' motion to dismiss for failure to file the bond"(App. 5).

The Appeals Court further observed that the

lower court was not obligated to allow Tucker's motions for reconsideration "in view of the plaintiffs' attorney's dilatory actions"(App. 5-6, n.6). As it ruled, "[a]n enlargement of time is appropriate when the failure to file a bond is excusable neglect on the part of plaintiff's counsel, where there is 'no question of irregular behavior on the part of counsel or [her] seeking tactical advantage through any pretense.'"(App. 5 quoting *Goldstein v. Barron*, 382 Mass. 181, 186-187 (1980)).

However, because Attorney Golden's conduct was *more than mere excusable neglect and constituted "irregular behavior"* on her part, the Appeals Court held that this decisional law did not apply and that Tucker's reconsideration motions were rightly denied(App.5-6). The Appeals Court failed to address Tucker's constitutional arguments that this peremptory dismissal of their action without a trial based on the gross oversights of their attorney unfairly denied them their constitutional right to due process and the equal protection of the laws.

Tucker then filed an Application for Leave to Obtain Further Appellate Review of this decision with the Supreme Judicial Court of Massachusetts. Besides rehearsing all of the facts already identified herein, Tucker emphasized that there is no evidence in this record that Orrie Tucker or Catherine Tucker had engaged in willful or bad faith conduct or that *Tucker's* conduct in any way formed a part of Judge Zobel's justification for ordering a dismissal of their complaint

against Metrowest and Dr. George.

That is, Judge Zobel *never* found or ruled that *the client Tucker* had engaged in willful or bad faith conduct. In addition, Judge Zobel's rulings, even Judge Locke's subsequent ruling, were based *solely* upon *counsel's* conduct, *not* the clients' behavior. Nor was it found that Tucker knew about, condoned or otherwise approved of their counsel's gross neglect in failing to secure in a timely manner the increased bond or in failing to produce the expert's letter when ordered to do so.

Tucker's application argued that in the unusual or extraordinary circumstances where an attorney's conduct in the course of litigation reaches the dimensions of *gross* neglect or egregious conduct, and there is an absence of any neglect by the clients themselves, there is no justifiable reason in law to impute such egregious conduct to the party and thereby deprive them unconstitutionally of their day in court on their legitimate claims.

Following the Supreme Judicial Court's denial of Tucker's application on May 3, 2004 (App.9-10), Tucker now brings their petition in this Court seeking a writ of certiorari to the Appeals Court of Massachusetts.

REASONS FOR GRANTING THE WRIT

An Emerging Consensus Among the Lower Courts That Imposing The Most Severe Sanction of Dismissal Upon Innocent and Faultless Clients For The Gross Neglect and Egregious Conduct of Their Attorneys Is A Violation of Due Process Warrants the Granting of This Petition.

Tucker's successive motions for the lower court's reconsideration of its dismissal of their complaint were treated by the Massachusetts courts as if labeled consistent with their obvious purpose, i.e., as if brought under Mass. R. Civ. P. 60(b)(1) or (6), or both. *Stilian v. GTC Corporation*, 17 Mass. App. Ct. 953, 953(1983). *Mullen Lumber Company, Inc. v. F.P. Associates, Inc.*, 11 Mass. App. Ct. 1018, 1019(1981). Rule 60(b) of the Massachusetts Rules of Civil Procedure is substantially the same as Fed. R. Civ. P. 60(b). *Chavoor v. Lewis*, 801, 804 n.1(1981). The Massachusetts appellate courts thus give this state rule of procedure the same construction given the cognate Federal rules. *Pentucket Manor Chronic Hospital, Inc. v. Rate Setting Commission*, 394 Mass. 233, 236-237(1985). *Parrell v. Keenan*, 389 Mass. 809, 815 n.8(1983). *Farley v. Sprague*, 374 Mass. 419, 423-424(1978).

Accordingly, the federal courts' interpretation of Rule 60(b) is profoundly relevant to the scope of Rule 60(b) in Massachusetts practice and the breadth of relief it provides litigants here. Moreover, this Court has the final responsibility to formulate the controlling

rules for hearings and proof which precede the entry of default judgments in order that those rules of procedure provide the parties with due process in their reach and result. *Klapprott v. United States*, 335 U.S. 601, 611(1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341(1943).

Tucker submits that an emerging consensus among the lower courts interpreting Rule 60(b) holds that imposing the most severe sanction of dismissal upon innocent and faultless clients such as Tucker for the gross neglect and egregious conduct of their attorneys is a violation of due process and that this consensus warrants the granting of this Petition. This Court has yet to rule on this precise question and, as the tribunal with the final say in how rules of civil procedure are implemented so that they provide fundamental fairness and due process to litigants, it should allow Tucker's Petition and take this opportunity to define with precision the kind of neglect by an attorney which will be imputed to clients in order to punish them with dismissal of their claims for its commission. It should then reverse and vacate the judgment below and remand this matter to the Superior Court Department for further discovery and an eventual trial because the gross neglect and egregious conduct by Tucker's counsel here cannot fairly be imputed to them and because a denial of their day in court on their claims as a result of it is a denial of due process.

Most actions taken by the parties' legal representative in the course of litigation are rightly imputed to those parties since those who decides to incur the expenses of retaining a lawyer should be able to rely on that lawyer to tend to the legal business at hand in a manner consistent with their interests. The presumption is that the client has notice of all facts known to his lawyer-agent; and even the negligence of the parties' attorney will be imputed to those parties.

In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 633-634(1962), Justice Harlan, writing for the Court's majority of four, stated that plaintiff's counsel's unexcused failure to appear at a pre-trial conference in an auto tort case because of a scheduling conflict was reason enough to dismiss the action with prejudice under Fed. R. Civ. P. 41(b):

> [t]here is certainly no merit to the contention that dismissal of Petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered

> to have "notice of all facts, notice of which can be charged upon the attorney."

Id. quoting *Smith v. Ayer*, 101 U.S. 320, 326(1879). In a footnote, the *Link* Court further noted that "keeping this suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of [the] plaintiff's lawyer upon *the defendant*." *Id.* at 634 n.10 (emphasis in original).

However, nothing in *Link* resolved the lower court's power to address the same problem under Rule 60(b). As Justice Harlan explained, "[p]etitioner never sought to avail himself of the escape hatch provided by Rule 60(b)." *Id.* at 632. In addition, this Court made clear that it was *not* considering whether the District Court would have been abusing its discretion had it rejected a motion by the petitioner under Rule 60(b) "which was accompanied by a more adequate explanation for the absence of petitioner's counsel from the pretrial conference." *Id.* at 635.

In *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 396-397(1993), this Court reiterated the *Link* principle that "clients must be held accountable for the acts and omissions of their attorneys." *Id.* citing *United States v. Boyle*, 469 U.S. 241, 250(1985)(late return of a tax filing). *Link* involved a late filing by respondents (unsecured creditors) in bankruptcy beyond the bar date. *Id.* at 384. The Bankruptcy Rule 9006(b)(1)

allowed such late filing if it were the result of "excusable neglect." *Id.* at 385. While the *Link* Court affirmed the court of appeals' decision providing relief to the unsecured creditors on the basis of excusable neglect, it expressly rejected the notion that the late filing by counsel could not be attributed to the clients. *Id.* at 396-397.

In so ruling, Justice White wrote that "at least for purposes of Rule 60(b), 'excusable neglect' is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence." *Id.* at 394. He distinguished those cases of ordinary negligence by a party or his attorney under Rule 60(b)(1) from those cases under Rule 60(b)(6) demonstrating "extraordinary circumstances" beyond the parties' control. *Id.* at 393-394. That is, "[b]ecause of the language and structure of Rule 60(b), a party's failure to file on time for reasons beyond his or her control is not considered to constitute "negligence." *Id.* citing *Klapprott*, 335 U.S. at 613-614. In this latter situation under Rule 60(b)(6), relief would be warranted if "the party is faultless in the delay." *Id.* at 393-394 citing *Ackermann v. United States*, 340 U.S. 193, 197-200(1950).

Klapprott's language is instructive. There the petitioner, a naturalized citizen of the United States but an alleged German national, had been defaulted from having a denaturalization hearing because he had been incarcerated for four years by the government

and was unable to obtain representation to defend against this denaturalization proceeding. 335 U.S. at 603; 614-615. In reversing the default judgment which had entered against him, this Court wrote:

> [A]ll petitioner has asked is that the default judgment be set aside so that for the first time he may defend on the merits. Certainly the undenied facts alleged justify setting aside the default judgment for that purpose. *Petitioner is entitled to a fair trial.* He has not had it. Fair hearings are in accord with elemental concepts of justice, and the language of the "other reason" clause of [Rule] 60(b) is broad enough to authorize the Court to set aside the default judgment and grant petitioner a fair hearing.

Id. at 615(emphasis supplied). See *United States v. Karahalias*, 205 F.2d 331, 335(2nd Cir. 1953)(Hand L., J.).

In the aftermath of the this Court's holdings in *Klapprott*, *Link* and *Pioneer*, the lower courts have formulated their own conclusions about when the gross and inexcusable neglect by an attorney, truly egregious conduct like Tucker's counsel here, in the prosecution of a civil action will be imputed to clients in order to justify punishing them with the ultimate sanction of dismissal of their claims with prejudice for its

commission.

Five federal circuit courts of appeals together with two federal circuits have agreed that an attorney's gross and inexcusable conduct, like the conduct here described by Judge Zobel, is the precisely the kind of "extraordinary circumstance" within Rule 60(b)(6) for which a faultless and unknowing client should *not* be held responsible and that relief from judgment entered for this reason should be allowed under Rule 60(b)(6) in order to give a party his day in court consonant with due process. *Greenspun v. Bogan*, 492 F.2d 375, 382(1st Cir. 1974). *Carter v. Albert Einstein Med. Ctr.*, 804 F.2d 805, 806-808(3rd Cir. 1986). *In re Virginia Info. Sys. Corp.*, 932 F.2d 338, 342 (4th Cir. 1991). *Shepard Claims Serv., Inc. v. William Darrah & Assocs.*,796 F.2d 190,195(6th Cir. 1986).*Community Dental Services v. Tani*, 282 F.3d 1164, 1168-1171 (9th Cir. 2002). *L.P. Stewart, Inc. v. Matthews*, 329 F.2d 234, 235(D.C. Cir. 1964). *Primbs v. United States*, 4 Ct. Cl. 366, 370(1984). See also *King v. Mordowanec*, 46 F.R.D. 474, 477-478(D. R.I. 1969); *United States v. Cirami*, 563 F.2d 26, 34-35(2nd Cir.1977).

Tucker's cause of action is a valuable property right entitled to due process protection. *Board of Regents v. Roth*, 408 U.S. 564, 571-572(1972). It cannot be taken away without notice and a hearing. *Id. Mathews v. Eldridge*, 424 U.S. 319, 333(1976). *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). To hold, as the Massachusetts courts have now held, that the gross and inexcusable neglect of an attorney in prosecuting a case should now be visited on the clients in the form of a dismissal of their action with prejudice is a denial of due process, is fundamentally unfair and

runs counter to the emerging consensus among the lower courts that imposing this most severe sanction upon innocent and faultless clients like Tucker for the gross neglect and egregious conduct of their attorney is a violation of due process.

In this regard, Justice Black's observations in his dissenting opinion in *Link*, 370 U.S. at 648-649, are apt:

> ...I think it would be far better in the interest of the adminstration of *justice*, and far more realistic in the light of what the relationship between a lawyer and his client actually is, to adopt the rule that no client is ever to be penalized, as this plaintiff has been, because of the conduct of his lawyer unless notice is given to the client himself that such a threat hangs over his head. Such a rule would do nothing more than incorporate basic constitutional requirements of fairness into the administration of justice in this country.
>
> ....
>
> [I]t is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court without notice to them solely because they are credulous enough to entrust their cases to lawyers whose names are accredited as worthy and capable by their government.

Id. (emphasis in original). See *Ackermann*, 340 U.S. at 205("It does no good to have liberalizing rules like

60(b) if, after they are written, their arteries are hardened by this Court's resort to ancient common-law concepts.")(Black, J., dissenting).

CONCLUSION

For all of the reasons identified herein, this Court should grant Tucker's petition for certiorari to the Appeals Court of Massachusetts, enter an order vacating the judgment below and remanding the matter to the Middlesex Division of the Superior Court Department for a jury trial of Tucker's claims; and/or provide them with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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(any footnotes trail end of each document)

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston,

In the case no. 02-P-461

Orrie Tucker & another,

v.

Metrowest Medical Center & another.

Pending in the Superior Court for the County of Middlesex,

Ordered, that the following entry be made in the docket:

Judgment affirmed.

[Filed in the Office
Of the Clerk of
Courts for the County
Of Middlesex—
January 20, 2004
Edward J. Sullivan Clerk]

By the Court,
[Ashley Ahearn], Clerk
Date: December 18, 2003.

Commonwealth of Massachusetts

APPEALS COURT

02-P-461

Orrie Tucker & another, \1/

v.

Metrowest Medical Center & another, \2/

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this medical malpractice case, the plaintiffs contend that the defendants were negligent in failing to order a sigmoidoscopy or colonoscopy following plaintiff Orrie Tucker's presentation with bloody diarrhea in December 1996. As a result, his colon cancer was not diagnosed until December, 1997, when he underwent emergency surgery removing an eight-inch section of his colon and requiring a colostomy. (A.9-12).

The defendants requested a medical malpractice tribunal pursuant to G.L.c. 231, Section 60B, and the date was set for April 25, 2001. (A.24). At the tribunal, the plaintiff's trial counsel, Roberta Golden, informed the defendants that she would not serve an offer of proof and would post a $6,000 bond to continue the action. (A.37). Attorney Golden posted the $6,000 bond that day. (See docket 4/25/01). As a result, the medical malpractice

tribunal found that there was insufficient evidence to raise a legitimate question of liability appropriate for judicial inquiry. (A.35). Relying on *Denton v. Beth Israel Hosp.*, 392 Mass. 277(1984), the defendants brought a motion to increase the amount of the bond.(A. 37-39).

On June 28, 2001, a conference to review the status of the case was held. (A.57). The court allowed the defendants' motion and set the bond at $12,000, staying the allowance of the motion until August 10, 2001, for further hearing. (A.71). According to the defendants' memorandum filed in opposition to the plaintiffs' (first) motion for reconsideration (A.200-202), which the judge, in denying that motion, referred to as accurately stating the history of this matter(A.208)\3/, the stay was based on Attorney Golden's representations that she had an expert letter regarding the case. She then stated that she did not have the letter with her in court and the court ordered her to fax the letter to defense counsel by the end of the day.

An undated expert's letter was faxed to defense counsel on July 10, 2001. (A.127). Defense counsel subsequently learned from the expert that the letter had not been written until July 5, 2001. The hearing was continued by the court until October 30, 30, 2001, at which time defense counsel informed the judge of Attorney Golden's misrepresentation to the court on June 28, 2001.(See A. 201, 208). The trial judge then removed the stay of his previous order and increased the bond to $12,000, payable within ten business days. He ordered the additional bond to be furnished by Attorney Golden, not by the plaintiffs.(A.150).

On November 13, 2001, the defendants brought motions to dismiss the plaintiffs' complaint because of failure to post the increased bond and for entry of final

judgment pursuant to Mass. R. Civ. P. 54(b), 365 Mass. 821(1974). (Docket #14, A. 142, 145). On November 21, 2001, the court allowed the defendants' motions.\4/ (A.196, 198). On December 19, 2001, the plaintiffs filed a motion for reconsideration which was denied on January 11, 2002. The judge found that the difficulties and delays in the case were due "entirely to the unexcused - indeed, inexcusable - conduct of Plaintiffs' counsel.... A party is ordinarily entitled to a day in court, however obnoxious the lawyer's conduct. This right is nonetheless not unlimited. As between a plaintiff whose lawyer's conduct has provoked condign punishment and the innocent defendant - put to unfair delay, expense, and uncertainty by plaintiff's counsel shenanigans - the former should bear the consequences." (A. 208). Judgment was entered on January 11, 2002, and the plaintiff filed a timely notice of appeal. (Docket ## 24, 25). On March 20, the plaintiffs, represented by successor counsel, filed a second motion for reconsideration. (A. 212-216). This motion was denied on April 23, 2002. (A. 226). A plaintiff may waive the medical malpractice tribunal by declining to present an offer of proof and is encouraged to do so by filing appropriate notice with the court. "Upon waiver by the plaintiff, the judge may enter a finding for the defendant as to the tribunal proceeding." *Denton v. Beth Israel Hosp.*, 392 Mass. at 280 n.4. "If a plaintiff declines to make an offer of proof, then the judge may assume that the plaintiff's are entirely frivolous. In that case, the judge may, without abusing his discretion, increase the bond to an amount calculated to cover all the costs which the defendant is likely to incur in defending the suit, including attorney's fees." *Id.* at 280.

We think the judge did not abuse his discretion in increasing the amount of the bond in this case. Indeed, he

stayed the order in reliance on the plaintiffs' counsel's representation that she had an expert letter. Once that representation proved to be false, he was justified in removing the stay and requiring that the additional amount be paid by plaintiffs' counsel. When the additional amount was not paid, there was no error in allowing the defendants' motion to dismiss for failure to pay the bond.\5/ An enlargement of time is appropriate when the failure to file a bond is excusable neglect on the part of plaintiffs' counsel, where there is "no question of irregular behavior on the part of counsel or [her] seeking tactical advantage through any pretense." *Goldstein v. Barron*, 382 Mass. 181, 186-187(1980). That is not the case here.

Judgment affirmed.
By the Court (Cypher, Cowin, & Mills, JJ.)
[Ashley Ahearn]
Clerk

Entered: December 18, 2003

Footnotes

\1/ Catherine Tucker.
\2/ William S. George.
\3/ The appendix does not contain the relevant transcripts.
\4/ The docket entries show that the findings and orders allowing the motions are dated November 21, 2001. This is clearly a scrivener's error. See A. 196 with the handwritten entry "11-21-01." Furthermore, November 11, 2001, was a State holiday, Veterans'
Day, and predated the motion by two days.
\5/ The plaintiffs argue that the additional bond was paid; however, that was not until December 12, 2001, after

judgment dismissing the case. The judge was not obligated to allow the plaintiffs' motions for reconsideration in view of the plaintiffs' attorney's dilatory actions.

Commonwealth of Massachusetts
County of Middlesex
The Superior Court

Civil Docket #:MICV2000-05888-A

RE: Tucker et. al. v. Metrowest Medical Center, f/k/a Framingham Union Hospital et al.

TO: Roberta Golden, Esquire
41 Pleasant Street
Framingham, MA 01701

NOTICE OF DOCKET ENTRY

You are hereby notified that on 1/21/2004,the following en-try was made on the above referenced docket:

JUDGMENT AFTER RESCRIPT - This action came on for entry of judgment upon receipt of the rescript from the Appeals Court from the Commonwealth of Massachusetts (Rules of Appellate Procedure, Rule 28), and thereupon, upon consideration thereof, it is ORDERED and ADJUDGED: Defendants motion to dismiss is allowed; plaintiffs complaint is dismissed with prejudice as to both defendants (copies sent)

Dated at Cambridge, Massachusetts this 21st day of January, 2004.

Edward J. Sullivan
Clerk of Courts

By: Brian Burke

Assistant Clerk

Supreme Judicial Court of Massachusetts

One Beacon Street, Third Floor, Boston, MA 02108

(617)557-1020

Dennis P. Derrick, Esquire
7 Winthrop Street
P.O. Box 37
Essex, MA 01929

Re: Docket No. FAR-14025

Orrie Tucker & another
vs.
Metrowest Medical Center & another

Middlesex Superior Court No. MICV2000-05888
A.C. No. 2002-P-0461

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 5/03/04, the above captioned Application for Further Appellate Review was denied. The Motion to File Application Late is allowed. (Cowin, J., recused.)

Susan Mellon, Clerk
Dated: May 3, 2004
To: Dennis P. Derrick, Esquire
George P. Lordan, Jr., Esquire
James L. Wilkinson, Esquire

Christopher Lavoie,, Esquire

Commonwealth of Massachusetts

Middlesex,ss.
Superior Court

Docket No. 00-5888

Orrie Tucker et al.,
Plaintiffs,

v.

Metrowest Medical Center et al.,
Defendants.

Memorandum and Order

Defendant Metrowest Medical Center's Opposition to Plaintiffs' motion for Reconsideration accurately states the history of this case.

I am firmly of the opinion that the difficulties and delays this case has produced are entirely to the unexcused—-indeed, inexcusable—-conduct for the Plaintiff's counsel.

Experience teaches that a lawyer who so vigorously disregards requirements of the sort involved here generally does so to pre-serve a weak case.

That observation, however, is not controlling. A party is *ordinarily* entitled to a day in court, however obnoxious the lawyer's conduct. This right is nonetheless

not unlimited. As between a plaintiff whose lawyer's conduct has provoked condign punishment and the innocent defendant— put to unfair delay, expense, and uncertainty by plaintiff's counsel's shenanigans— the former should bear the consequences.

ORDER

Accordingly, it is Ordered, that Plaintiff's Motion for Reconsideration be, and the same hereby is, in all respects, Denied.

[Hiller B. Zobel]

Hiller B. Zobel

Associate Justice

Superior Court

Dated: January 10, 2002

[Entered on docket
& copies mailed 1/11/2002]

[Excerpts of the Appellate Brief of Orrie and Catherine Tucker filed in the Appeals Court of Massachusetts in the case of *Orrie and Catherine Tucker v. Metrowest Medical Center, f/k/a Framingham Union Hospital and William S. George, M.D.*, A. C. No. 2002-P-0461, pp. 29-43]

C. The Dismissal of the Complaint Was Unconstitutional And Unjustly Penalized the Plaintiffs.

The Judge abused his discretion and erred as a matter of law when he penalized the Plaintiffs because of the alleged misconduct of the Plaintiffs' original counsel. The Judge based his dismissal upon the failure to post the increased bond in the amount of $6,000.00 by the Plaintiffs' counsel only and at her sole expense within ten business days....

....The Plaintiffs' counsel actually paid the additional $6,000.00 bond on December 12, 2001, which was due on November 16, 2001, but which was delayed because of the Plaintiffs' counsel's excusable delay in acquiring a surety bond or the funds necessary to post the bond. No specific reasons, except the Judge's sole decision that the Plaintiff's counsel had "a weak case" and that the Defendants were "innocent," were given by the Judge....

....The Plaintiffs contend that the application of the statutes [requiring the filing of a bond] that have imposed financial obstacles to the obtaining of access to the Courts violate their rights and deprive them of due process....The unbridled discretion of the Judge to set the bond amount in the present case has been exercised unreasonably, prohibiting a meritorious claim which gives rise to a constitutional violation. The decision in the case

of *Damaskos v. Board of Appeals of Boston*, 359 Mass. 55(1971),...held that the statute [requiring a bond] met constitutional standards as long as the judge exercised his discretion in setting the bond amount to accomplish these purposes [of discouraging frivolous appeals and not unreasonably obstructing claims with merit].

In the present case, the Judge abused his discretion by requiring $12,000.00 for a case which could have passed muster at the tribunal and only for the purposes of punishing Plaintiffs' counsel rather than the Plaintiffs.

A number of cases have sustained due process challenges to statutes that presented financial obstacles to the filing of a civil suit, such as, *Boddie v. Connecticut*, 401 U.S. 371, 380-383 (1971).

The Plaintiffs suggest that they are subjected to a violation of Article 15 of the Massachusetts Declarations of Rights because they have been subjected to an unreasonable burden in order to proceed with a meritorious suit....

....The question then becomes, are these fees constitutional or do they violate Article 11, Article 15 and/or Article 30 of the Massachusetts Declaration of Rights and by extension the comparable rights guaranteed under the United States Constitution. We present this issue to the Court for consideration.

Furthermore, in the present case the Judge has made a third party unrelated to the negligence claims responsible for payment of the bond in order for the parties to go forward. In other words, the Judge has tied the hands of the Plaintiffs' ability to pursue their meritorious claims dependent upon a third party's actions that have no claim at all against the Defendants. This financial obstruction, the payment of $6,000.00 by

Plaintiffs' counsel, the payment of which is ordered not to be passed on to the Plaintiffs, is itself unconstitutional and a violation of the Plaintiffs' rights under Massachusetts Declaration of Rights and the United States Constitution.

This Court should provide the equal treatment protected by the Fourteenth Amendment to the [United States] Constitution because the [L]egislature[']s standard in passing General Law[s] Chapter 231, Section 60B, and the Court[']s interpretations have denied the Plaintiffs their rights under Massachusetts Law and the Fourteenth Amendment under the united States Constitution....